Supreme Court, U.S.
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No. 94-2011

In The

Supreme Court of the United States

October Term, 1995

RAY QUALMANN MARINE CONSTRUCTION, INC.,

Petitioner,

vs.

KIMBERLY ANN SAN, Individually and as Personal Representative of the Estate of LAZARO JESUS SAN, Deceased,

Respondent.

On Petition For Writ Of Certiorari
To The District Court Of Appeal Of The State Of Florida
For The Fourth District

RESPONDENT'S BRIEF IN OPPOSITION

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July, 1995

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RESTATEMENT OF JURISDICTIONAL QUESTION PRESENTED

WHETHER THE PER CURIAM AFFIRMANCE, WITHOUT OPINION, RENDERED BY THE DISTRICT COURT OF APPEAL, FOURTH DISTRICT OF FLORIDA, GENERATES A BASIS FOR CERTIORARI REVIEW TO ELIMINATE THE RECOVERY OF NON-PECUNIARY DAMAGES BY DEPENDENTS OF A DECEASED EMPLOYEE WHO ARE ENTITLED TO RECOVER DAMAGES PURSUANT TO 33 U.S.C. § 905(b) OF THE LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT?

LIST OF ALL PARTIES TO THE PROCEEDING

Counsel for Respondent certifies to the Court that the following persons are parties to or have an interest in the outcome of the litigation.

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RAY QUALMANN MARINE CONSTRUCTION, INC.,
Petitioner

KIMBERLY ANN SAN, Individually and as Personal Representative of the Estate of LAZARO JESUS SAN, Deceased, Respondent

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RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, KIMBERLY ANN SAN, Individually and as Personal Representative of the Estate of LAZARO JESUS SAN, Deceased, respectfully requests that this Court deny the Petition for Writ of Certiorari, which seeks review of the affirmance, per curiam, without opinion rendered by the District Court of Appeal, Fourth District of Florida, reported at 652 So.2d 831 (Fla. 4th DCA 1995). The litigation involved claims for wrongful death damages resulting from the death of LAZARO JESUS SAN, who was crushed when the boom of a waterborne barge crane collapsed upon him. The Petitioner,

RAY QUALMANN MARINE CONSTRUCTION, INC., was the defendant owner of the water-borne barge crane vessel found by a jury to be in active control of a crane as a vessel owner, and to be negligent in the capacity as a vessel owner. The Petitioner was the defendant in the trial court, the appellant in the district court of appeal, and will be referred to herein as "MARINE."

Respondent, KIMBERLY ANN SAN, Individually and as Personal Representative of the Estate of LAZARO JESUS SAN, Deceased, was the plaintiff in the trial court, presenting the family's death claims. The deceased will be referred to in this brief as "SAN," and the dependents will be referred to by name.

RESTATEMENT OF THE CASE

A. Overview – No Jurisdiction.

The present case involves only claims for wrongful death damages recoverable pursuant to 33 U.S.C. § 905(b), Longshore & Harbor Workers' Compensation Act, by dependents of an employee killed in state territorial waters. There was no seaman involved, nor did death occur on the high seas. The litigation did *not* involve any issues with regard to damages recoverable pursuant to either 46 U.S.C. § 688, et seq. (Jones Act), or 46 U.S.C. § 761, et seq. (Death on the High Seas Act).

The decision below, without opinion, does not create a special or important basis for jurisdiction to be exercised. The determination did not create conflict with any principle of law enunciated by either this Court or any

other state or federal appellate court. The decision below does not set forth any principle of law important to the public generally, nor has any conflict of opinion or authority been created.

MARINE ignores the legal status and classification differences and distinctions provided in different statutory provisions in pursuit of its individual interests. MARINE incorrectly attempts to group all water-related deaths into a category favorable to MARINE for purposes of legal argument. The result below is supported by *Moragne v. States Marine Lines*, 398 U.S. 375, 90 S. Ct. 1772 (1970), and *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 95 S. Ct. 806 (1974), and numerous other decisions from other federal appellate courts.

B. Statement of Case and Facts.

The Respondent generally accepts the statement of case as outlined by MARINE, with some modifications. The present litigation proceeded to trial upon a complaint that sought damages resulting from the death of SAN attributed to the negligence of MARINE as the owner of a vessel. SAN was alleged to be an employee of Tricor Marine Construction who met his demise when a cable upon a barge crane snapped and the crane boom fell upon and crushed SAN. As the litigation proceeded, MARINE and SAN agreed that the Longshore & Harbor Workers' Act, particularly § 905(b) would be applicable.

Issues for trial were narrowed and limited through a process of stipulations, and very specific jury instructions were formulated, along with special interrogatory verdict forms to limit consideration of negligence in this case to

that of MARINE in its capacity as a vessel owner in connection with the operation of the barge crane vessel. Pursuant to proper instructions and special interrogatory verdict forms, the jury found that the crane which crushed SAN was under the active control of MARINE in its capacity as a vessel owner, and there was negligence on the part of MARINE in its capacity as a vessel owner as defined in the instructions.

Pursuant to the verdict form submitted to the jury, the jury awarded non-pecuniary wrongful death damages to the dependents of SAN, and a final judgment was entered upon the jury verdict. MARINE sought review of the judgment as entered in the District Court of Appeal, Fourth District of Florida, which rendered a per curiam affirmance, without opinion. *Ray Qualmann Marine Construction, Inc. v. San*, 652 So.2d 831 (Fla. 4th DCA 1995).

REASONS WHY THE PETITION SHOULD BE DENIED

From an historical perspective, civil remedies available in connection with water-borne deaths from the early 1920's until the early 1970's were generally centered upon 46 U.S.C. § 761, et seq. (Death on the High Seas Act); 46 U.S.C. § 688, et seq. (Jones Act); or available state provisions for death in territorial waters. The Jones Act covered deaths of seamen without regard to location, the Death on the High Seas Act was applicable to deaths beyond territorial waters, and the deaths of those having other and different classifications were addressed by state concepts. Multiple theories of responsibility were also

interwoven which varied from negligence to strict liability type standards.

Of importance to claims involving longshoremen such as the present case, in 1970 this Court in *Moragne, supra,* recognized the propriety of a cause of action for wrongful death of a longshoreman in connection with activities that were not covered by either the Jones Act or the Death on the High Seas Act. Shortly thereafter, in 1972, the Longshore & Harbor Workers' Compensation Act was amended in 33 U.S.C. § 905(b) to provide that *anyone* entitled to recover damages in the event of injury to a person covered by the particular act could maintain a third-party negligence action against a vessel owner based upon standards of negligence, not seaworthiness. Neither the scope of negligence concepts nor the elements of damages were specifically enumerated, but this Court in *Scindia Steam Navigation Co., Ltd. v. Santos,* 451 U.S. 156, 101 S. Ct. 1614 (1981), directed that negligence and liability be resolved through application of traditional principles of tort law. Thus, as of 1972 through both judicial and legislative action, longshoremen not covered by other legislation were entitled to the recovery of wrongful death damages based upon negligence concepts.

Development of the law concerning the recovery of wrongful death damages by dependents of longshoremen continued in *Sea-Land Services, Inc. v. Gaudet, supra,* in which this Court outlined that a dependent could recover both pecuniary and non-pecuniary damages resulting from the death of a longshoreman in territorial waters. The decisions of the trial court and the District Court of Appeal, Fourth District of Florida, are consistent with all

of the foregoing in affirming the recovery of damages by the dependents of SAN in this litigation.

A totally separate and distinct category of cases addresses the parameters of recovery for those in a classification and status to be subject to the Death on the High Seas Act. Those in such category are controlled by the very specific legislative provision that provides damages only for pecuniary losses. As specifically set forth in 46 U.S.C. § 762, the recovery in connection with those in the Death on the High Seas category is limited to only pecuniary losses sustained by the persons for whose benefit the suit is brought. Such legislative provision does not apply to longshoremen or deaths in territorial waters. As can be seen in the decision of this Court in *Mobil Oil Corp. v. Higginbotham,* 436 U.S. 618, 98 S. Ct. 2010 (1978), the parameter of damages recoverable in connection with a person killed on the high seas is totally different from those damages recoverable in connection with longshoremen in territorial waters. The same result can be seen in connection with the Death on the High Seas Act in *Offshore Logistics, Inc. v. Tallentire,* 477 U.S. 207, 106 S. Ct. 2784 (1986). Thus, through the late 1980's the parameters of damages recoverable in connection with the death of longshoremen in territorial waters and those recoverable in connection with death on the high seas were very clearly separate and distinct and well delineated.

Finally, this Court in *Miles v. Apex Marine Corp.,* 498 U.S. 19, 111 S. Ct. 317 (1990), considered only the operative effect of the Jones Act in connection with the death of a true seaman and claims for damages by parents rather than dependents of the seaman. As noted by this Court in *Miles,* the law applicable in the present case which

involves death in state territorial waters of a longshoreman remains controlled by *Sea-Land Services, supra.* As this Court noted in *Miles,* the Jones Act in 46 U.S.C. § 688(a) specifically adopts and incorporates the law applicable to railway employees as outlined in 45 U.S.C. § 51, et seq., which contains a survival provision in 45 U.S.C. § 59. Further, this Court recognized in *Miles* that for Jones Act deaths, the constitutional scheme should not be utilized to sanction broader remedies in connection with liability without fault circumstances. As can be seen in the present case, the standard is direct negligence and there is no strict liability or liability without fault concept involved.

When the status and classifications of the various parties are analyzed in this litigation it is clear that there is no conflict or confusion. Confusion results only when the distinctions and differences in the status and classifications of individuals are totally ignored. This Court has outlined the parameters of the cause of action and recovery for the classifications of those covered by the Jones Act, those covered by the Death on the High Seas Act, and those of longshoremen killed in state territorial waters.

The statement by MARINE that *Gaudet* would have no operative effect after 1972 is *not* correct with regard to the scope of damages. The 1972 amendment to the Longshore & Harbor Workers' Compensation Act eliminated liability without fault but imposed a negligence standard. The amendment did not in any way alter or change the damages recoverable in connection with the death of a longshoreman in state territorial waters. Where liability

without fault has been eliminated there is no reason to further restrict the remedies or recovery available.

Finally, contrary to the assertion by MARINE, courts have ruled consistently with regard to wrongful death actions involving longshoremen in state territorial waters. It is only MARINE that seeks to commingle persons involved in different categories and having remedies available pursuant to different statutory provisions to create an artificial perception of conflict. Lower federal appellate courts have consistently applied the decisions of this Court which address remedies available in connection with the wrongful deaths of longshoremen in state territorial waters. The Jones Act and Death on the High Seas Act cases have different statutory limitations not applicable to longshoremen in territorial waters. The Court need only review the decisions presented by MARINE to find the consistency depending upon the particular statutory remedy involved.

As noted by this Court in *N.L.R.B. v. Pittsburgh S.S. Co.*, 340 U.S. 498, 71 S. Ct. 453 (1951), certiorari is designed to be applied only in connection with cases in which stated principles of law are of importance to the public as distinguished from importance to the parties involved in litigation. Certiorari is reserved for those cases in which there has been a real and embarrassing conflict of opinions and authorities among the Circuit Courts of Appeal, and in this situation there is not even conflict when the particular factual circumstances are reviewed. Certiorari is not designed to satisfy the academic interests of particular parties, particularly where parties such as MARINE seek to commingle to create

artificial conflict. *See, e.g., Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 75 S. Ct. 614 (1955).

CONCLUSION

The per curiam affirmance, without opinion, rendered by the District Court of Appeal, Fourth District of Florida, does not generate a sufficient basis for entertaining certiorari jurisdiction. No principle of law has been enunciated that is in conflict with any decision of this Court or any other appellate court. The state district court correctly applied established precedent in connection with the factual circumstances involved. The courts below properly applied existing law with regard to wrongful death claims involving longshoremen in state territorial waters. It is only MARINE that attempts to find conflict by extending limitations from Jones Act and Death on the High Seas Act circumstances into factual circumstances involving totally different statutory claims and persons occupying different positions. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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